Supreme Court, U.S.
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No. 95-371

In the Supreme Court of the United States

OCTOBER TERM, 1994

DOUGLAS COUNTY, OREGON, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
HEADWATERS, INC. AND
UMPQUA VALLEY AUDUBON SOCIETY, RESPONDENTS

PETITIONER'S REPLY BRIEF

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Douglas County, Oregon, Petitioner

v.

Bruce Babbitt, Secretary of the Interior,
Headwaters, Inc. and
Umpqua Valley Audubon Society, Respondents

Petitioner Douglas County, Oregon respectfully submits this reply brief in support of its petition for a writ of certiorari.

STATUS OF RELATED LITIGATION

On November 13, 1995 the court of appeals for the Tenth Circuit heard oral argument in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, No. 94-2280, the appeal of a decision by the district court in New Mexico enjoining the FWS from designating critical habitat for two listed species in that state until it complies with NEPA.

A decision by the Tenth Circuit affirming the district court would create a direct conflict in the circuits on the

issue presented in Douglas County's petition. The Court may wish to consider holding Douglas County's petition until the Tenth Circuit rules in *Catron County*.

THE COURT OF APPEALS DECISION BELOW CONFLICTS WITH *FLINT RIDGE* AND OTHER CIRCUITS' DECISIONS, AND THE ISSUE IS IMPORTANT AND RECURRING

The court should grant Douglas County's petition. The court of appeals' decision below conflicts with decisions by this court and six courts of appeals on an important and recurring issue of national application. The *amicus* briefs of the National Association of Home Builders and the Pacific Legal Foundation demonstrate the national importance of the issue in this case.

Respondents concede that the Secretary of Interior never complies with NEPA on ESA critical habitat designations throughout the country, and that the decision below supports that national policy. Thus, the issue in this case is clearly national in scope, and has a high potential for recurring, as evidenced by the *Catron County* case in the Tenth Circuit.

Respondents also concede the court below excused the Secretary of the Interior from complying with NEPA for ESA critical habitat designations even though it found there is no "irreconcilable and fundamental conflict" between the two statutes. Respondents further concede that in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma ("Flint Ridge")*, 426 U.S. 776, 787-88 (1976) this court required such "irreconcilable and fundamental conflict" to excuse NEPA compliance, and that other circuits have similarly

insisted on "irreconcilable and fundamental conflict" with another statute to excuse NEPA compliance.

Respondents point to no other case in the 25 year history of NEPA where a court has ever found that a statute contains an implied exemption from NEPA without such an "irreconcilable and fundamental conflict."[1]

Rather than dispute the applicability or validity of *Flint Ridge* and the courts of appeals decisions following it, respondents argue that the court of appeals' ruling here is consistent with *Flint Ridge*, and does not conflict with other courts of appeals. They can make this argument only by mischaracterizing the two key elements of the court of appeals' holding.

A. The court below excused NEPA compliance without finding any conflict between ESA and NEPA in this case.

The court below did not find that there was any "irreconcilable and fundamental conflict" between NEPA and ESA. Rather, it expressly ruled that such a conflict is not necessary to excuse NEPA compliance: "Douglas County argues that without this 'irreconcilable' statutory conflict, NEPA must apply. We disagree . . . ." Pet. App. 15a. It believed its prior decisions "do not state that the finding of irreconcilable conflict is the only way to avoid the NEPA provisions . . . ." App. 21a.

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[1] Respondents did not argue below, and do not claim here, that there is any "functional equivalence" between NEPA procedures and ESA critical habitat procedures which some courts in the early days of NEPA recognized as excusing NEPA compliance. *See* Pet. App. 19a n.10.

Respondents argue that the court of appeals found a "conflict" between NEPA and ESA, although not an "irreconcilable and fundamental conflict," based on the possibility that the Secretary might in a hypothetical situation have a duty to designate a particular area as critical habitat regardless of the environmental impacts of doing so.

Yet the court of appeals found no conflict between NEPA and ESA *in this case*. While it is conceivable, as the court suggested, Pet. App. 18a, that there could be a situation where ESA might require the Secretary to make a specific designation to avoid extinction of a particular species regardless of environmental effects, the Secretary did not apply that narrow exception *in this case*, nor, for that matter, did he point to a case where he has ever invoked that exception.

In this case, the Secretary was free to consider any relevant impact, including environmental, economic and social impact, in designating critical habitat for the spotted owl. In making this wide-ranging assessment, the Secretary and the public could have benefited substantially from the development and scientific evaluation of a full range of alternatives that would have been provided by NEPA. The Secretary denied himself and the public this information, to the harm of the process and the final decision, by refusing to comply with NEPA. The Secretary refused to develop or consider any alternatives except the single proposal that ultimately became the final decision.

B. Neither court below ever found that the spotted owl critical habitat designation has no environmental impacts.

Both the federal and environmental respondents argue as if there had been a factual finding in the lower courts that the spotted owl critical habitat designation has no environmental impacts. No such finding was ever made. The court of appeals excused NEPA compliance regardless of the actual environmental impacts of the designation.

When respondent Headwaters argued in the district court that the designation was exempt from NEPA because it had no environmental impacts, the district court rejected the argument on factual grounds: "Headwaters' argument . . . assumes a fact not in evidence. That is, Headwaters' argument assumes that the designation decision will not effect changes in the physical environment. As noted above, that presumption is not necessarily accurate." Pet. App. 55a. The district court explained: "In this case, the designation of critical habitat allegedly has beneficial grounds for the Northern Spotted Owl, but adverse effects on other species and adverse socio-economic effects on the human environment." Pet. App. 56a.

Neither the district court nor the court of appeals ever made a factual finding that no environmental impacts would result from the designation. To the contrary, both the district court and the court of appeals premised their acceptance of Douglas County's standing in this case on the reasonable likelihood that such environmental impacts would in fact occur. Respondents' defense of the decision below on factual grounds is therefore insupportable.

C. There is no factual or legal basis to argue that NEPA does not encompass environmental impacts resulting from federal decisions to "let nature take its course."

Nor is it tenable for respondents to argue either factually or as a matter of Congressional intent that NEPA never applies to environmental impacts that result from a decision to prohibit use or development of large areas of land, or to "let nature take its course." Many federal decisions to prevent human interference or interaction with nature have predictable and potentially catastrophic environmental impacts plainly encompassed within NEPA.

For example, a federal decision to end fire suppression in western forests — to "let it burn" — would greatly increase the harmful environmental impacts of wildfires. A federal decision to end flood control — to "let it flood" — would have disastrous environmental effects on areas that would be exposed to floods. A federal decision to eliminate pest control at the borders or on federal land could have calamitous effects on farming and forestry throughout the country. In this case, as Douglas County showed, the federal decision to permanently preserve 6.9 million acres of forest land for the spotted owl would harm other wildlife species which rely on early-successional forest stages that follow logging.

In addition, preserving large tracts of federal land would lead to more intensive use of remaining unprotected areas of federal land, as well as non-federal land, with major environmental effects on those lands.

These are significant physical impacts on the human environment by any measure. That is why this court's

decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), holding that purely psychological impacts are not encompassed within NEPA, does not support the court of appeals' interpretation of NEPA in this case.

The impacts here are on the physical environment. NEPA, aided by the Council on Environmental Quality's regulations, requires federal agencies to look for such environmental impacts on a case-by-case basis through preparation of an environmental assessment, and to prepare an environmental impact statement in cases where significant environmental impacts are found. The court of appeals improperly short-circuited the required process — regardless of the actual impacts of the critical habitat decision — by finding an implied statutory exemption.

The court of appeals' conclusion, urged by the environmental respondents but not the Secretary, was that NEPA does not command federal agencies to identify and analyze the major impacts on the physical environment that result from a critical habitat designation and similar federal decisions to "preserve the environment." This is directly counter to NEPA's direction that all agencies comply "to the fullest extent possible," 42 U.S.C. 4332, and is contrary to *Flint Ridge* and its many progeny in other circuits.

D. The interpretation of NEPA is not influenced by the presumed environmental sincerity of the party seeking compliance with the statute.

The environmental respondents suggest, Brief in Opp. for

Respondent Headwaters at 1-4, and the court of appeals seemed to believe, that the interpretation of NEPA should turn on the environmental sincerity of the party filing the case, and that Douglas County's claim should be rejected because the court presumed that Douglas County is not sincere in its interest in protecting the environment. *See* Pet. App. 28a ("We are reluctant . . . to make NEPA more of an 'obstructionist tactic' to prevent environmental protection than it may already have become.").

There is no language in NEPA, no rule of statutory interpretation, and no judicial precedent from any court that varies the meaning of NEPA or any statute according to the presumed motivation of the party filing suit. The court of appeals' evident (and unwarranted) disapproval of Douglas County's environmental sincerity, and its view that Douglas County's sincerity should influence the interpretation of NEPA, is itself a reason for this court to grant the petition and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 15th day of December, 1995.

Respectfully submitted,

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